BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-8
	)	
Home Shopping Stations Issues	)	

COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("Time Warner"), hereby respectfully submits these Comments in response to the above-captioned Notice of Proposed Rule Making released by the Federal Communications Commission ("Commission") on January 28, 1993.[1] Time Warner is a partnership which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, the second largest operator of cable television systems nationwide; Home Box Office, which operates pay television programming services; and Warner Bros., which is a major producer of theatrical motion pictures and television programs.

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[1] Notice of Proposed Rule Making in MM Docket 93-8, ____ FCC Rcd ____, adopted January 14, 1993 ("NPRM").

INTRODUCTION

In this proceeding, the Commission seeks comment on that portion of Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (the "1992 Act") which relates to the carriage by cable systems of commercial broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials ("home shopping stations").

Specifically, Section 4 of the 1992 Act adds to the Communications Act a new Section 614, 47 U.S.C. § 534, imposing mandatory carriage ("must carry") obligations on cable systems with respect to commercial broadcast television stations.[2] Pursuant to Section 614(g), the Commission is required, within 270 days of the date on which the 1992 Act was enacted, to complete a proceeding to define the circumstances under which commercial broadcast television stations that are home shopping stations are entitled to must carry. Pending the outcome of this proceeding, cable carriage of home shopping stations is neither required nor prohibited.

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[2]Time Warner currently is challenging the constitutionality of various provisions of the 1992 Act, including Section 4. Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992). Time Warner's comments in the instant proceeding are filed without prejudice to the pending constitutional challenge and do not waive or otherwise limit Time Warner's constitutional rights or any future challenge to the rules adopted in this or other proceedings to implement the 1992 Act.

Section 614(g) represents a compromise designed to resolve one of the most hotly-contested issues raised by the 1992 Cable Act -- the must carry status of home shopping stations.[3] In the House, the decision whether to carry home shopping stations was left entirely to the discretion of the cable operator; such carriage was neither required nor prohibited.[4] In the Senate, however, a similar provision was defeated and, in its place, an amendment was passed directing the Commission to conduct a proceeding to determine whether home shopping stations serve the public interest, convenience, and necessity.[5]

Consequently, it was left to the Conference Committee to resolve the issue of the must carry status of home shopping stations. After considerable debate, the conferees worked out a compromise that essentially combined the Senate and House approaches in a single provision.[6] Specifically, Section 614(g)(1) of the Act embodies the House language, while Section 614(g)(2) reflects the Senate approach. The task before the Commission in this proceeding is to implement this compromise in a manner that best serves the public interest.

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[3]See, e.g., "Hill Hears Home Shopping Must Carry Debate," Broadcasting, June 24, 1991 at 25; "HSN: Must Carry Law No Bargain," Multichannel News, June 24, 1991 at 8. The debate over home shopping must carry actually originated in the previous Congress. See H.R. Rep. No. 101st Cong., 2d Sess. 159-162 (1990).

[4]See H.R. Rep. No. 92-628, 102d Cong., 2d Sess. 96 (1992).

[5]See 138 Cong. Rec. S. 570-582, 586 (Jan. 29, 1992).

[6]See H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 74-75 (1992).

DISCUSSION

Time Warner strongly believes that the must carry provisions contained in Section 614 represent a facially unconstitutional intrusion into the First Amendment rights of cable operators and programmers. Time Warner's position on the constitutional issues involving mandatory carriage for broadcast stations is fully set forth in its papers filed in the legal proceedings referenced above. While we do not believe that it is necessary to repeat our arguments here, we do believe that the "home shopping

operators and programmers), the requisite nexus between the interest and the means of promoting it are entirely lacking in the must carry requirements.

The debate over the application of the must carry rules to home shopping stations, and the statutory resolution of that debate in Section 614(g), only serves to highlight the fundamental deficiencies in the approach taken by Congress. In

represent either a legitimate or appropriately tailored means of promoting any compelling governmental interest, Time Warner submits that it is incumbent upon the Commission in this proceeding to ensure that there is a nexus between the government's asserted interest in localism and the extension of mandatory carriage rights to a home shopping station. Time Warner further submits that an appropriate way for the Commission to achieve this end is for it to hold that mandatory carriage obligations do not apply with respect to stations that are characterized principally by the transmission, in prime time hours, of nationally-distributed home shopping programming.

Time Warner takes no position on the issue of whether a station carrying predominantly program length commercials and sales presentations should per se become ineligible to retain its broadcasting license, except to point out that the "all or nothing" approach proposed in the Commission's Notice[8] mischaracterizes long-established broadcast renewal standards as well as the underlying concerns addressed by Section 614(g). In determining a station's license eligibility, the Commission properly does not dwell on matters relating to the content of the entertainment programming selected by the licensee, or on whether the licensee has chosen a format consisting predominantly of program length commercials.[9] Rather, the question is whether the

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[8]NPRM at ¶ 12.

[9]See Silver King Broadcasting of Vineland, Inc., 68 RR 2d 991 (1990).

licensee has presented a sufficient amount of programming responsive to public issues of importance to the community, as identified by the licensee.[10] For example, two licensees might both carry identical amounts of home shopping programming. One might qualify for a renewal expectancy because its overall programming was sufficiently responsive to local community issues, while the other station might not be entitled to a renewal expectancy because it carried no such programming.

In contrast, the principal issue that Congress was seeking to address in Section 614(g) and, thus, the issue at hand in this proceeding is whether, and to what extent, home shopping stations should be granted must carry rights, not whether or to what extent such stations should be eligible for broadcast licenses. Indeed, even the most ardent opponents of home shopping must carry have acknowledged the right of such stations to broadcast programming consistent with their selected format.[11] Accordingly, it is both reasonable and proper for the Commission to adopt rules that, while not barring the transmission of such programming, do not unduly reward or encourage it. Specifically,

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[10]See, e.g., Cowles Broadcasting, Inc., 86 FCC 2d 973 (1981), aff'd sub nom. Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503 (D.C. Cir. 1982), cert. denied, 103 S.Ct. 1774 (1983); Metroplex Communications, 4 FCC Rcd 8149 (Rev. Bd. 1989), review denied, 5 FCC Rcd 5610, aff'd sub nom. Southeast Florida Limited Partnership v. FCC, 947 F.2d 505 (D.C. Cir. 1991); Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 4 FCC Rcd 6363 (1989).

[11]See 138 Cong. Rec. S. 572 (statement of Sen. Breaux) (home shopping stations "ought to have the right to exist; they ought to have a right to broadcast their signals").

the Commission can and should limit the must carry rights of stations whose principal defining characteristic is the transmission of nationally distributed home shopping programs. Moreover, should the Commission determine that certain home shopping stations are required to alter their programming format either to attain must carry status or to guard against a loss of their renewal expectancy, such stations should not be entitled to must carry rights until such changes in format have been instituted.

We note in this regard that Congress has drawn other distinctions between stations in an effort to tailor the must carry rules to more closely meet the government's stated interest in localism. For example, the must-carry rules currently create certain preferences for non-duplicating stations over duplicating stations and for stations located close to a cable headend over more distant stations. Section 614(g) is similar in that it recognizes that the broadcast transmission of nationally distributed home shopping programming does not necessarily further the interest in localism proferred in support of must carry. The difference is that, in singling out home shopping stations for special scrutiny, Congress has left the specific task of line drawing to the Commission. And while Time Warner submits that there is no amount of line drawing that can save the grossly overburdensome must carry rules, the Commission should not shrink from its obligation to effectuate this distinction in

a meaningful manner, by denying must carry rights to stations that predominantly transmit home shopping programming.

CONCLUSION

Time Warner urges the Commission to reject an "all or nothing" approach to implementing Section 614(g) and instead adopt rules that effectuate the underlying purpose of that provision by establishing standards for determining when a home shopping station is entitled to mandatory cable carriage.

Respectfully submitted,

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